Supreme Court, U.S.
FILED
931986 JUN 10 1994

NO.

In the
Supreme Court of the United States

OCTOBER TERM, 1993

MURPHY EXPLORATION &
PRODUCTION COMPANY
Petitioner

VERSUS

WILLIE EARL DAVIS
Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS FOR
THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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34 pp

QUESTIONS PRESENTED FOR REVIEW

1. In a Jones Act case asserting an employer's liability for an employee's development of an extremely rare disease, must medical causation in fact be proven with a reasonable evidentiary basis, although the burden of proof for negligence is "featherweight"?

2. May an employee not entitled to benefits under a Group Insurance Plan funded almost entirely by his employer, through misrepresentation, obtain a double recovery from his employer through operation of the collateral source rule, thereby allowing him to profit from his own dishonesty?

3. Is it a clear abuse of discretion to exclude probative, relevant evidence under Federal Rule of Evidence 403 where any unfair prejudice can be eliminated by editing the documents or giving the jury a limiting instruction?

TABLE OF CONTENTS

PAGE

QUESTIONS PRESENTED FOR REVIEW i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

REPORT OF OPINIONS BELOW iv

STATEMENT OF JURISDICTION v

STATUTES AT ISSUE vi

STATEMENT OF THE CASE 1

ARGUMENT 6

1. THE FIFTH CIRCUIT APPLIED THE WRONG STANDARD; A "COMPLETE ABSENCE OF PROBATIVE FACTUAL EVIDENCE ON THE ISSUE OF MEDICAL CAUSATION" IS NOT REQUIRED TO OVERTURN THE JURY'S VERDICT 6
2. THE FIFTH CIRCUIT'S RULING ON APPLICATION OF THE COLLATERAL SOURCE RULE RESULTS IN GROSS INEQUITY AND ELIMINATES ANY INCENTIVE TO EMPLOYERS TO MAINTAIN EMPLOYEE BENEFIT PLANS, BOTH ISSUES OF SIGNIFICANT SOCIAL IMPORTANCE 13
3. EXCLUSION OF RELEVANT AND PROBATIVE EVIDENCE UNDER FEDERAL RULE OF EVIDENCE 403 WHICH SEVERELY PREJUDICES THE DEFENSE OF THE CLAIM MUST BE CONSIDERED AN ABUSE OF THE DISTRICT COURT'S DISCRETION . 18

CONCLUSION 24

CERTIFICATE OF SERVICE 25

TABLE OF AUTHORITIES

PAGE

CASES:

Borras v. Sea-Land Services, Inc., 586 F.2d 881 (1st Cir. 1978) . . 8

Brock v. Merril Dow Pharmaceuticals, Inc., 874 F.2d 307 (5th Cir. 1989) 9

Chisolm v. Sabine Towing & Transportation Co., 679 F.2d 60 (5th Cir. 1982) 8

Daubert v. Merrell Dow Pharmaceuticals, Inc., ____ U.S. ____, 113 S.Ct. 2786 (1993) 12

Gauthier v. Crosby Marine Service, Inc., 752 F.2d 1085 (5th Cir. 1985) . 14

Phillips v. Western Co. of North America, 953 F.2d 923 (5th Cir. 1992) 14

Rogers v. Missouri Pacific Railroad Company, 352 U.S. 500, 77 S.Ct. 443, 1 L.Ed.2d 493 (1957) 8

Vallot v. Central Gulf Lines, Inc., 641 F.2d 347 (5th Cir. 1981) 10

STATUTES:

Federal Rule of Evidence 403 . . 18,20, 23,i,viii

Jones Act, 46 U.S.C. §688 . . . . passim

28 U.S.C. §1254 v

28 U.S.C. §1291 4

REPORT OF OPINIONS BELOW

Davis v. ODECO, Inc.,
18 F.3d 1237 (5th Cir. 1994)

Davis v. ODECO, Inc.,
1992 WL 245670 (E.D.La. Sept. 14, 1992)

Davis v. ODECO, Inc.,
1992 WL 165698 (E.D.La. July 2, 1992)

Davis v. ODECO, Inc.,
1992 WL 125430 (E.D.La. May 15, 1992)

Davis v. ODECO, Inc.,
1992 WL 91988 (E.D.La. April 14, 1992)

Davis v. ODECO, Inc.,
1992 WL 40880 (E.D.La. February 20, 1992)

STATEMENT OF JURISDICTION

Jurisdiction in this Court is proper pursuant to 28 U.S.C. §1254, on application for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit, from a Judgment issued April 4, 1994. Petitioner's Suggestion For Rehearing En Banc was denied by Order dated May 3, 1994.

STATUTES AT ISSUE

1. Jones Act, 46 U.S.C. §688

§688. Recovery for injury to or death of seaman

(a) Application of railway employee statutes; jurisdiction. Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located.

(b) Limitation for certain aliens; applicability in lieu of other remedy. (1) No action may be maintained under subsection (a) or under any other maritime law of the United States for maintenance and cure or for damages for the injury or death of a person who was not a citizen or permanent resident alien of the United States at the time

of the incident giving rise to the action, if the incident occurred--

(A) while that person was in the employ of an enterprise engaged in the exploration, development, or production of offshore mineral or energy resources -- including but not limited to drilling, mapping, surveying, diving, pipelaying, maintaining, repairing, constructing, or transporting supplies, equipment or personnel, but not including transporting those resources by a vessel constructed or adapted primarily to carry oil in bulk in the cargo spaces; and

(B) in the territorial waters or waters overlaying the continental shelf of a nation other than the United States, its territories, or possessions. As used in this paragraph, the term "continental shelf" has the meaning stated in Article I of the 1958 Convention on the Continental Shelf.

(2) The provisions of paragraph (1) of this subsection shall not be applicable if the person bringing the action establishes that no remedy was available to that person --

(A) under the laws of the nation asserting jurisdiction over the area in which the incident occurred; or

(B) under the laws of the nation in which, at the time of the incident, the person for whose injury or death a remedy is sought maintained citizenship or residency.

2. Federal Rule Of Evidence 403

Rule 403. Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

STATEMENT OF THE CASE

Willie Earl Davis ("Davis"), an ODECO, Inc. ("ODECO")[1] employee, brought suit against ODECO alleging he developed a rare disease diagnosed as Goodpasture's Syndrome ("GPS") as a result of exposure to hydrocarbon solvents during his employment. He asserted claims for negligence under the Jones Act and for unseaworthiness of various ODECO rigs under the General Maritime Law.

Davis claimed that he was entitled to maintenance and cure benefits, which Murphy denied inasmuch as medical and disability benefits had been paid pursuant to ODECO's Group Insurance Plan for non-

---

1 Suit was originally filed against ODECO, Inc. which, during the course of the litigation, was reorganized and its successor-in-interest, Murphy Exploration and Production Company, a wholly owned subsidiary of Murphy Oil Company, was substituted as the party defendant.

occupational disability. Davis and his physicians, before he hired an attorney and filed his lawsuit, told Murphy his GPS was not work-related.

Prior to trial, the court excluded both evidence of the payments made under the Plan and the numerous Health Insurance Claim Forms submitted by Davis and his physicians to obtain payments for medical expenses and disability benefits. The basis for the court's ruling was that the Plan constituted a collateral source and the prejudicial nature of the forms outweighed their probative value. The court also ruled the forms were irrelevant because the payments made based on those forms were from a collateral source.

This matter proceeded to trial on August 17, 1992 before a jury. On August 28, 1992, the jury returned a verdict finding Murphy negligent, certain of its vessels unseaworthy (but not all of

them), negligence per se, and that the negligence, unseaworthiness and negligence per se were each a legal cause of Davis' illness. The jury found that Davis himself was 40 percent negligent, but that allocation of fault was precluded by the finding of negligence per se under Section 53 of FELA.

The jury awarded past medical expenses of $142,000.00 and maintenance of $12,600.00. The jury was never told that Davis had already collected $174,259.68 under the nonoccupational Group Insurance Plan. The jury awarded $400,000.00 for past, present and future pain and suffering, disability, loss of capacity for the enjoyment of life, mental anguish, and feelings of economic insecurity; past lost wages of $30,000.00; future loss of ability to earn money of $43,000.00; as well as $48,000.00 in future medical expenses.

This judgment was affirmed by a panel of the United States Court of Appeals for the Fifth Circuit on April 4, 1994, and a Suggestion For Rehearing En Banc was denied by that court on May 3, 1994. Jurisdiction in that court was proper pursuant to 28 U.S.C. §1291.

Davis, prior to February 28, 1990 (his last date worked), worked for ODECO approximately ten years. He served in various capacities aboard numerous ODECO rigs. Davis was diagnosed with GPS, a disease first identified in 1919 involving three components: kidney disease, lung disease and autoimmune disease. Since 1919, only 500 cases have been recorded worldwide. Davis alleged that his GPS was the result of his being exposed to hydrocarbon solvents, spray paint, and other chemicals with which he worked during his employment with ODECO. He claimed he was not provided with proper respiratory

protection and was not trained in the use of respirators during his employment.

Murphy maintained there is no connection between hydrocarbons and development of GPS, that the opinion of Davis' expert was based on incomplete, exaggerated and inaccurate data concerning alleged levels of exposures to hydrocarbons and the duration of those exposures. The evidence at trial showed that while Davis was employed, he spent only a very small portion of that time spray painting or using the chemicals and paints which he alleged caused his disease. Indeed, the appellate court found evidence of causation to be both "inconclusive" and "tenuous". 18 F.3d at 1242.

ARGUMENT

1. THE FIFTH CIRCUIT APPLIED THE WRONG STANDARD; A "COMPLETE ABSENCE OF PROBATIVE FACTUAL EVIDENCE ON THE ISSUE OF MEDICAL CAUSATION" IS NOT REQUIRED TO OVERTURN THE JURY'S VERDICT

Davis brought his claim for damages, alleging that because of Murphy's negligence, he was exposed to hydrocarbons and, as a result, contracted an extraordinarily rare disease, GPS. The Fifth Circuit, in reviewing the evidence submitted by Davis to establish a link between exposure to hydrocarbons and the development of GPS and, more particularly, Murphy's alleged negligence and Davis' GPS, recognized that "a causal relationship between such exposure and development of GPS has not been firmly established". 18 F.3d at 1240. At best, there is only a suggestion that exposure to hydrocarbons may spur development of GPS. Continuing, the court agreed "that the evidence supporting the hypothesis that exposure to hydrocarbons causes

GPS is inconclusive" and that "the narrower premise that Davis' exposure to hydrocarbons induced his GPS is even more tenuous". 18 F.3d at 1242.

The evidence submitted was so tenuous that the jury was left to base its decision on speculation. Davis' primary expert in support of his claims, Dr. R. Garth Kirkwood, unequivocally testified that "doctors don't know for sure exactly what causes Goodpasture's Syndrome to develop". (Tr., p. 530, l. 17)

That the courts, over the years, have held that the plaintiff-seaman in a Jones Act case has a "featherweight" burden of proof to establish negligence on the part of his employer is well established and has been nearly universally adopted. However, once negligence has been proven, the plaintiff still has the burden of proving that the negligent conduct complained of

was a cause in fact of the injury or illness. Chisolm v. Sabine Towing & Transportation Co., 679 F.2d 60, 62 (5th Cir. 1982). There must be a causal connection between the negligence and the injury in order for the negligence to be a legal cause of the injury. Id.

In Borras v. Sea-Land Services, Inc., 586 F.2d 881 (1st Cir. 1978), the court held that in a Jones Act case the "proofs must justify with reason" the conclusion that the employer's negligence was a cause of plaintiff's injury, citing Rogers v. Missouri Pacific Railroad Company, 352 U.S. 500, 77 S.Ct. 443, 1 L.Ed.2d 493 (1957). Murphy would suggest that not only was there an absence of proof that any negligent acts on its part exposed Davis to hydrocarbons but that there was a complete absence of proof which would justify "with reason" a finding that hydrocarbons in fact cause GPS.

Dr. Kirkwood admitted that he could not prove such a connection. (Tr., p. 556, l. 9-25) Simply stated, the jury's finding of medical causation was based on speculation, and cannot be supported with reason. In Brock v. Merril Dow Pharmaceuticals, Inc., 874 F.2d 307 (5th Cir. 1989), the Fifth Circuit found that the court must determine whether the inferences drawn from the evidence by a jury were reasonable. Here, the jury was asked to conclude that exposure to hydrocarbons caused Davis' GPS during his employment. To do this, they were presented evidence which consisted of speculation and hypothesis. This Court can and should examine the reasonableness and sufficiency of the evidence submitted. Murphy would suggest that such an examination will lead to the conclusion that the evidence on medical causation was lacking and does not constitute the "reasonable

proof" of causation necessary to support the decision reached by the jury.

In Vallot v. Central Gulf Lines, Inc., 641 F.2d 347 (5th Cir. 1981), the court held that the standard for testing the sufficiency of the evidence in a Jones Act case is whether there is a reasonable evidentiary basis for the jury's verdict. Even taken in its best light, there was no reasonable evidence on which the jury could reasonably conclude that hydrocarbons caused Davis' GPS.

There does not have to be "a complete absence of probative factual evidence on the issue of medical causation" for this Court to overturn the verdict. There must be sufficient evidence from which a reasonable inference can be drawn to establish a link between hydrocarbons and GPS. How can such a conclusion be drawn when the evidence at trial was inconclusive, tenuous and, at best, suggestive?

Davis' own experts admitted that the brightest minds in medical science do not know what causes GPS, yet the jury was asked to find that exposure to hydrocarbons, in fact, caused Davis' GPS.

The age of "toxic tort" litigation is upon us. In increasing numbers, litigants are asking lay juries to decide complex medical issues which decades of medical experts have been unable to resolve. The Fifth Circuit's decision, if allowed to stand, means that any Jones Act claimant may, on the most scant medical evidence, establish employer negligence and medical causation to support a jury award for any disease which develops, regardless of the tenuous connection between employment and genesis of the disease. This is an issue of significant importance, as a single medical witness who makes a causal connection for a Jones Act plaintiff under his "featherweight" burden of proof can

now establish employer liability. This is a departure from the direction of this Court's decisions, such as Daubert v. Merrell Dow Pharmaceuticals, Inc., ____ U.S. ____, 113 S.Ct. 2786 (1993).

The standard for medical causation in examination of a jury's verdict should not be the complete absence of probative factual evidence. Rather, there must have been a reasonable evidentiary basis for the jury's conclusion. Here, there was nothing but speculation and guesses presented to the jury. This does not constitute a reasonable basis for the jury's decision and it should be overturned.

2. THE FIFTH CIRCUIT'S RULING ON APPLICATION OF THE COLLATERAL SOURCE RULE RESULTS IN GROSS INEQUITY AND ELIMINATES ANY INCENTIVE TO EMPLOYERS TO MAINTAIN EMPLOYEE BENEFIT PLANS, BOTH ISSUES OF SIGNIFICANT SOCIAL IMPORTANCE

In its decision, the Fifth Circuit affirmed the district court in ruling that Murphy's Group Insurance Plan, which paid Davis $174,259.68 in benefits, constituted a collateral source. Therefore, evidence of the Plan was properly excluded at trial, and setoff in favor of Murphy precluded. The effect of this ruling is that Davis will obtain a double recovery of medical benefits in the amount of $142,179.84 and, in addition to Accident & Sickness benefits obtained under the Plan, will also receive an award of maintenance in the amount of $12,600.00. This is the end result to Murphy, despite the fact that by the terms of its Plan, no benefits were payable to Davis if his illness was work-related. Only because Davis and his

physicians submitted Health Insurance Claim Forms to Murphy and its plan administrator, Pan-American Life Insurance Company, representing that Davis' illness was not work-related, were any payments made.

In all of the cases cited by the Fifth Circuit, including Phillips v. Western Co. of North America, 953 F.2d 923 (5th Cir. 1992), and Gauthier v. Crosby Marine Service, Inc., 752 F.2d 1085 (5th Cir. 1985), the plaintiff was entitled to receive the benefits deemed to be from a collateral source. Here, there has never been such a representation made. Clearly, Davis was only entitled to benefits under the Plan if his illness was not work-related. Payments were made to Davis on the basis of the representations made by both him and his treating physicians that the illness was not work-related. The court's ruling allows Davis to profit from

his own dishonesty. He, either intentionally or negligently, represented to Murphy that his illness was not work-related and, therefore, he obtained benefits under the Plan. His treating physicians did the same thing to obtain payment of their fees. Only later, after this wealth of benefits had been received, was it ever suggested that Davis' illness was work-related. That notification was the filing of a Jones Act lawsuit.

The social importance of this issue is clear. Under a plan such as Murphy's, an employee can assert a claim for an illness that is not work-related and collect benefits for three years under the plan. Then, still within the Jones Act/General Maritime Law prescriptive period, can file suit for damages against his employer and obtain a double recovery, confident in the knowledge that evidence of the payments received under the plan will not be intro-

duced at his liability trial because those payments are from a collateral source. The courts below have guaranteed dishonest employees a method by which they can profit from the benevolence of their employers in establishing a group insurance plan on their behalf.

What incentive remains for employers to maintain group insurance plans for the benefit of employees to protect them from non-work-related illnesses and injuries, if they face the specter of double liability from those who would abuse the system? The Fifth Circuit recognized this in its opinion, but nevertheless failed to give the employer placed in this position any protection.

> Although we emphatically do not wish to discourage employers from taking prophylactic measures against future liability, in this case, the fact that the Plan applied exclusively to nonwork-related injuries leads us inexorably to the conclusion that the

> Plan was conceived not as a hedge against liability but as a fringe benefit to further compensate employees.

18 F.3d at 1248.

Benevolent employers, rather than being rewarded for taking care of their employees, can now face certain punishment at the hands of unscrupulous employees. The collateral source rule applied by the courts below brings just such a result. This result is grossly inequitable, unjust, and senseless. Employers who try to care for their employees should not face such an absurd result. The collateral source rule was not adopted by the courts to allow dishonest employees to double their recovery through misrepresentations to their employers. Murphy has sought not to take from Davis anything to which he was entitled. Davis was <u>never entitled</u> to receive the benefits he obtained under the Plan. He obtained

those benefits only through misrepresentation of his illness being non-work-related. Rather than prevent him from obtaining something to which he is not entitled, the court has rewarded him a double recovery instead. This decision should be reversed to prevent this result.

3. EXCLUSION OF RELEVANT AND PROBATIVE EVIDENCE UNDER FEDERAL RULE OF EVIDENCE 403 WHICH SEVERELY PREJUDICES THE DEFENSE OF THE CLAIM MUST BE CONSIDERED AN ABUSE OF THE DISTRICT COURT'S DISCRETION

Murphy sought to introduce at trial the Health Insurance Claim Forms submitted by Davis and his physicians to Murphy and Pan-American Life Insurance Company, for a number of reasons. First, the forms were sought to be introduced as evidence of the payments made. In addition, the forms were sought to be introduced to impeach Dr. R. Garth Kirkwood, Davis' primary treating physician and primary witness at

trial on the issue of causation. On all of the forms he submitted, Dr. Kirkwood indicated Davis' illness was not work-related. He changed his testimony before trial and opined that it was related to Davis' employment.

In addition, the forms were sought to be introduced to defend against Davis' claim for punitive damages for the alleged arbitrary and capricious failure to pay maintenance and cure. Murphy's claims examiner, Charles B. Guy, Sr., would have been called to testify at trial (his testimony was proffered by affidavit) to explain why maintenance and cure was not paid. When suit was filed, Mr. Guy investigated the claim and learned from the Employee Benefits Section of Murphy that all of the Health Insurance Claim Forms which had been submitted to Murphy and Pan-American Life Insurance Company reflected that Davis' illness was not

work-related. With these medical opinions in hand, the decision was made not to pay maintenance and cure benefits.

Given the court's exclusion of the Health Insurance Claim Forms, Murphy could not cross-examine and impeach Dr. Kirkwood at trial with respect to the clear change in his medical opinions. Also, Mr. Guy could not be called to testify because the court would not allow him to explain why maintenance and cure benefits were not paid. The jury was left with no explanation whatsoever with respect to defense of the maintenance and cure claim and Davis' claim for punitive damages for the alleged arbitrary and capricious refusal to pay maintenance and cure.

This issue is worthy of consideration by this Court to give district judges guidance on the proper limitations on their discretion with respect to application of Federal Rule of Evidence 403. As

the Fifth Circuit correctly pointed out, the court could have easily entered a limiting instruction to the jury to prevent prejudice to Davis with respect to these forms. 18 F.3d at 1247. Indeed, the forms themselves could have been edited to remove any information concerning a claim for insurance. The portions of the form which contain the physician's signature or stamp and the section setting forth the opinion of the relationship to employment were the essential elements of the forms sought to be introduced, both with respect to the defense of the maintenance and cure claim and with respect to medical causation and impeachment of Dr. Kirkwood.

Clearly, those portions of the forms were highly probative and directly relevant to the central issues in the case. The Fifth Circuit, in its ruling, acknowledged: "Technically, the district court

was probably incorrect in determining that the Forms literally had no relevance because they were evidence of a collateral source." 18 F.3d at 1247. The forms were relevant. They were probative in addressing the causation and maintenance and cure issues. The prejudice to the plaintiff, if any unfair prejudice existed, could have been easily alleviated by editing the forms or providing a limiting instruction to the jury.

But instead, the court precluded Murphy's defenses altogether. The court refused to allow Murphy to properly attack Dr. Kirkwood's opinions as to causation. Murphy was not allowed to impeach Dr. Kirkwood with his own earlier opinions concerning the lack of an employment relationship to Davis' alleged illness. Murphy was prevented from defending against the maintenance and cure and punitive damages claims because Mr. Guy

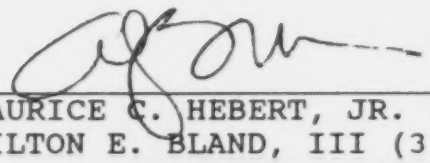
was not allowed to testify as to his reason for refusing to pay maintenance and cure and the results of the investigation he conducted.

This must be considered an abuse of discretion. Where relevant, probative evidence exists and any unfair prejudice to the opposing party can be eliminated through editing the documents and giving a limiting instruction to the jury, Federal Rule of Evidence 403 should not allow a district judge to exclude such evidence. This should be considered a clear abuse of discretion by the district judge, and the Judgment should be reversed at this Court to clarify the limits of such discretion in circumstances such as are presented here.

CONCLUSION

Murphy Exploration & Production Company respectively submits to this Honorable Court that a writ of certiorari in this matter on all three issues presented for consideration. These are issues of exceptional social importance and warrant consideration by the Court.

Respectfully submitted,



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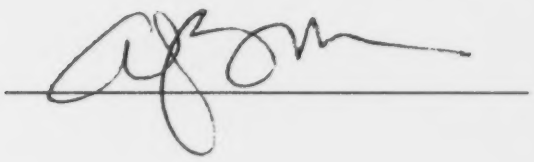
CERTIFICATE OF SERVICE

I hereby certify that I have this 9th day of June, 1994 served a copy of the foregoing on all counsel of record via the United States Postal Service, properly addressed, and postage prepaid.



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WILLIE EARL DAVIS
Respondent

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APPENDIX TO
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48 pp

INDEX TO APPENDIX

APPENDIX A A-1

APPENDIX B A-45

APPENDIX A

Beverly P. DAVIS, wife of/and Willie Earl Davis, Plaintiffs-Appellees,

v.

ODECO, INC., Defendant,

Murphy Exploration & Production Company, originally sued as Odeco, Inc., Defendant-Appellant

No. 92-9529.

United States Court of Appeals, Fifth Circuit.

April 4, 1994

Before VAN GRAAFEILAND*, SMITH, and WIENER, Circuit Judges.

WIENER, Circuit Judge:

Plaintiff-Appellee Willie Earl Davis (Davis) and his wife sued Defendant-Appellant Murphy Exploration & Production

---

* Circuit Judge of the Second Circuit, sitting by designation

Company (Murphy Co.),[1] alleging that Murphy Co. contravened the Jones At and general maritime law by exposing him to hydrocarbons while he worked aboard its vessels. Davis contends that this exposure caused him to contract Goodpasture's Syndrome (GPS), a rare disease with renal, pulmonary, and auto-immune symptoms. Davis won a $675,600.00 jury verdict, and the district court entered a judgment for Davis in that amount. Murphy Co. timely appealed, positing that the district court committed 19 reversible errors in the course of the trial.

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1 Although Murphy Co. was formerly known as ODECO, Inc., throughout this opinion we shall refer to the Appellant as Murphy Co., even when referring to events that took place when it was known as ODECO, Inc.

I

FACTS AND PROCEEDINGS

Davis worked for Murphy Co. for approximately ten years as a roustabout, a floorhand, a shaker hand -- all positions involving unskilled labor. During that time, he worked aboard thirteen different Murphy Co. vessels. In November 1989, while aboard the Ocean Titan, Davis coughed up blood. Although contemporaneous records of Davis' medical treatment reveal that he had abnormally high concentrations of protein and blood in his urine, he was not advised that he had any serious problems, and he went back to work.

On February 23, 1990, however, just before boarding the Ocean America, Davis again felt sick. Five days later he collapsed and was promptly evacuated by Murphy Co. to West Jefferson Medical

Center where he was admitted in critical condition. For a time medical specialists were unable to diagnose Davis' condition, although they were able to rule out a number of diseases, including Legionnaire's disease and AIDS. Ultimately, Davis was diagnosed as having GPS, an uncommon condition comprising three disease components: kidney disease, lung disease, and autoimmune disease.[2] During his illness, Davis received $174,259.68 in medical and disability payments from the Group Insurance Plan (the Plan), which was established (and largely funded) by Murphy Co. to compensate employees for nonwork-related

---

2 GPS apparently has an estimated incident rate of about one case per two million individuals. Only about 500 cases have been documented worldwide since 1919.

accidents and illnesses.[3] Davis ultimately filed a complaint in district court, contending that his exposure to hydrocarbons while working for Murphy Co. caused him to develop GPS.[4] Although medical evidence exists that links development of GPS with exposure to hydrocarbons, a causal relationship between such exposure and development of GPS has not been firmly established.[5]

---

3 The Plan actually subsumed two plans: the Major Medical Plan (90% funded by Murphy Co.) and the Accident and Sickness Plan (100% funded by Murphy Co.).

4 One of Davis' duties was to spray paint things, and he testified that he was often covered with paint that contained hydrocarbons. Additionally, he worked with paint thinners and diesel fuel, both of which are essentially hydrocarbon mixtures.

5 Case reports, longitudinal studies, and animal experiments all *suggest* a correlation between exposure to hydrocarbons and development of GPS. Some scientists opine that "although

(continued...)

Davis nevertheless asserts that Murphy Co. was negligent in failing to (1) provide him with a respirator, (2) train him to use a respirator, and (3) require him to use a respirator, all the while forcing

---

5(...continued)

> there may be some doubt, ... the evidence supports a causal relationship" between hydrocarbons and GPS. Others aver, however, that the evidence is not sufficient to support a causal nexus. Obviously, then, doubt persists about the causal relationship between exposure to hydrocarbons and development of GPS, although there is sufficient evidence upon which a jury might reach a verdict.
>
> If the basic causal connection between exposure to hydrocarbons and development of GPS remains in doubt, then the precise molecular mechanism for that putative disease process is obviously unknown. Some believe that the hydrocarbons themselves damage the tissues, with the patient's immune system then recognizing and attacking those damaged tissues epiphenomenally. Others speculate that the hydrocarbon molecules insinuate themselves into the membranes of healthy cells, thereby turning them antigenic and stimulating autoimmunity.

him to work with compounds rich in hydrocarbons. He also averred that Murphy Co. was negligent *per se* in violating Coast Guard Regulations that required Murphy Co. to (1) have a written policy regarding use of respirators, (2) fit-test employees annually to ensure that their respirators fit properly, and (3) perform air monitoring for hazardous substances and medical monitoring of employees for signs of exposure to such substances. Finally, Davis alleged that several of Murphy Co.'s vessels aboard which he served were "unseaworthy," essentially for the same reasons that Murphy Co. was allegedly negligent.

After the district court ruled on a barrage of pre-trial motions, the case went to trial, with Davis winning a verdict. The jury concluded that Murphy Co. had been both negligent and negligent

per se, and that several of the Murphy Co.'s vessels had been unseaworthy. The jury awarded Davis a total of $675,600.00 in damages and maintenance, as follows: $300,000 for past pain and suffering, $100,000 for future pain and suffering, $30,000 in past lost wages, $43,000 in future lost wages, $142,000 for past medical expenses, $48,000 for future medical expenses, and $12,600 for maintenance. The court duly entered judgment for $675,600.00, and Murphy Co. timely appealed, contending that the district court committed nearly a score of reversible errors in the course of the trial.

II

ANALYSIS

After carefully considering the facts and legal arguments advanced by counsel in

their briefs to this court and in their oral arguments to this panel, and after reviewing the record from the district court, we conclude that the majority of the 19 claims of error advanced by Murphy Co. on appeal -- while not frivolous -- lack sufficient factual and legal substance to justify reversing the district court and are not here entitled to elaborate treatment. Several issues, however, do merit more extensive discussion, and we proceed to consider these.

A. *Fault or Breach of Standard of Care*

Davis essentially asserted two causes of action in this case: negligence under the Jones Act, and the unseaworthiness of Murphy Co.'s vessels under general maritime law. To establish negligence under the Jones Act, Davis also averred

that Murphy Co. violated applicable Coast Guard regulations, and thus was negligent *per se*.[6] The jury found that Murphy Co. was negligent and negligent *per se* "in the manner claimed by the plaintiff." The jury also found certain of Murphy Co.'s vessels to have been unseaworthy. On appeal, Murphy Co. argues, inter alia, that the evidence was insufficient to support the jury's verdict.

We may overturn the jury's determination that some of Murphy Co.'s vessels were *unseaworthy* only if the facts and inferences favor Murphy Co. so strongly that a reasonable jury could not

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6 It does not really matter whether we regard negligence *per se* as a distinct cause of action or a means of establishing a violation of the appropriate standard of due care. Rarely does anything turn on this distinction because, however the theory is characterized, a plaintiff must nonetheless prove causality and damages.

have reached a verdict for Davis.[7] In contrast, as Davis' *negligence* claims are brought under the Jones Act, the jury's verdict that Murphy Co. was negligent and negligent *per se* must stand unless "there is a complete absence of probative facts to support the verdict."[8] Consequently, we must not disturb the verdict unless Davis failed to advance even a marginal

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7 *See, e.g., Boeing Co. v. Shipman*, 411 F.2d 365, 374-75 (5th Cir. 1969 (en banc); *according Phillips v. Western Co. of North America*, 953 F.2d 923, 927 (5th Cir. 1992).

8 *Bommarito v. Penrod Drilling Corp.*, 929 F.2d 186, 188 (5th Cir. 1991) (citing *Thornton v. Gulf Fleet Marine Corp.*, 752 F.2d 1074, 1076 (5th Cir. 1985)). Significantly, the parties agree that Davis is properly classified as a seaman; Davis' claim thus fell within the purview of the Jones Act.

claim for relief.[9] We have appropriately labeled this burden as "featherweight."[10]

As the jury did not apportion damages among applicable legal theories, we must affirm the jury's award -- and the judgment of the district court -- if the verdict is supportable under any legal theory advanced by Davis. Because the "complete absence of supporting probative facts" standard is appreciably more deferential to jury verdicts that the reasonable jury standard, we need only consider whether Davis adduced sufficient evidence to meet the "featherweight" burden under the Jones Act.[11] We conclude that he did.

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9 *See, e.g., Springborn v. American Commercial Barge Lines, Inc.*, 767 F.2d 89, 98 (5th Cir. 1985); *Holmes v. J. Ray McDermott & Co.*, 734 F.2d 1110, 1120 (5th Cir. 1984).

10 *Bommarito*, 929 F.2d at 188.

11 *Id.*

Although Murphy Co. vigorously contested Davis' allegations that it was negligent for failing to provide him with a respirator, to train him to use a respirator, and to require him to use a respirator at all relevant times, we cannot say that our review of the record reveals the complete absence of probative facts that is required to overturn a verdict under the Jones Act.[12] At trial, Murphy Co. did introduce convincing evidence that respirators were available for Davis' use, that Davis knew how to use a respirator, and that Murphy Co. had a policy requiring its employees to use respirators at appropriate times. Nonetheless, there was not a complete

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12 *Id.* Davis himself testified that Murphy Co. had not always made respirators available, had never trained him to use one, and had not always required him to wear one when working with hydrocarbons.

absence of probative fact supporting Davis' allegations, and we are therefore constrained to uphold the jury's verdict.

Moreover, Murphy Co. did not adequately respond to Davis' contention that it was negligent *per se*. Davis argued that Murphy Co. was negligent *per se* under the Jones Act because it violated applicable Coast Guard Regulations (hereinafter "ANSI standards")[13] -- effective January 12, 1987 -- that established a standard of care requiring Murphy Co. to (1) have a *written* policy regarding use of respirators, (2) fit-test employees annually to ensure that their respirators fit properly, and (3) perform air

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13 ANSI is an acronym that stands for "American National Standards Institute." See *infra* note 14 for a discussion of how these standards were incorporated into the Coast Guard Regulations.

monitoring for hazardous substances and medical monitor of employees for signs of exposure to such substances.[14] In response to these arguments, Murphy Co. asserts that its policies regarding use of respirators were stricter than those imposed by the ANSI standards because Murphy Co. required (presumably through an

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14 The relevant regulatory provisions, ANSI z88.2--1980, details a standard operating procedure for use of respirators in certain work environments. As of January 12, 1987, ANSI z88.2 was incorporated into the Coast Guard Regulations. 51 Fed.Reg. 28, 381 (1986); 33 C.F.R. 142.39. In view of this incorporation, the district court "reach[ed] the inevitable conclusion that the ANSI z88.2-1980 standards relative to respiratory protection applied without limitation to [Murphy Co.] subsequent to January 12, 1987." Murphy Co. does not here dispute the district court's conclusion. Informed in the course of trial of the applicability of the ANSI z88.2-1980 standards to Murphy Co.'s conduct, the jury found Murphy Co. negligent *per se* in violating those standards, which were intended to benefits workers such as Davis.

unwritten policy) that "respirators be used at all times."[15]

This response is, however, something of a non sequitur. The ANSI regulations did not require Murphy Co. to enact respirator use policies of a given arbitrary stringency. Rather, they required Murphy Co. to establish a written policy concerning use of respirators. Murphy Co.'s response is thus feckless. Additionally, Murphy Co. did not even allege that it complied with the ANSI standards requiring fit-testing and air monitoring. Indeed, Murphy Co. conceded that it may not have "follow[ed] the ANSI standards to the letter". Murphy Co. thus appears unable convincingly to gainsay the jury's finding that Murphy Co. violated applicable Coast Guard Regulations and was thus negligent per se. As there was not a

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15 Emphasis in Murphy Co.'s Brief.

complete absence of probative facts to support the jury's determination that Murphy Co. was negligent and negligent per se under the Jones Act, we will not upset the jury's finding that Murphy Co. breached the applicable standard of care.

B. Causality

Murphy Co. also asserts that "the jury lacked sufficient evidence to find medical causation". We agree that the evidence supporting the hypothesis that exposure to hydrocarbons causes GPS is inconclusive. Obviously then, the evidence supporting the narrower premise that Davis' exposure to hydrocarbons induced his GPS is even more tenuous. But again, there was not a complete absence of probative factual evidence on the issue of medical causation -- as there must be to overturn a jury verdict under the Jones

Act.[16] Significantly, Davis is entitled to recovery under the Jones Act if he adduced probative evidence that Murphy Co.'s negligence played any part --

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16 Bommarito, 929 F.2d at 188 (citing Thornton v. Gulf Fleet Marine Corp., 752 F.2d 1074, 1076 (5th Cir. 1985)). At trial, Davis called three medical experts to testify to the causal relationship between exposure to hydrocarbons and development of GPS. Dr. Garth Kirkwood, a nephrologist who treated Davis, opined "that it is more probable than not that Mr. Davis' hydrocarbon exposure played a contributory causal role in his development of Goodpasture's Syndrome". These experts also cited several studies that discuss the relationship between exposure to hydrocarbons and development of glomerulonephritis (GN) -- a kidney disease essentially identical to the renal disease component of GPS. Additionally, Davis cited articles in medical journals that assert the existence of a causal relationship between exposure to hydrocarbons and development of GPS. Admittedly, the evidence supporting Davis' contention that exposure to hydrocarbons induced his development of GPS is underwhelming. It is, however, sufficient to support the jury's verdict under the Jones Act's featherweight standard.

however small -- in the development of his condition.[17] Moreover, the jury was entitled to infer causation from unexplained events.[18] Whether we believe that Davis' evidence of a causal nexus between his exposure to hydrocarbons and his development of GPS preponderates is irrelevant. He clearly proffered some

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17 See, e.g., Rogers v. Missouri Pacific R.R. Co., 352 U.S. 500, 506, 77 S.Ct. 443, 448, 1 L.Ed.2d 493, 499 (1957) (discussing the standard of review under the Federal Employers' Liability Act (FELA), which was incorporated into the Jones Act); see also Kernan v. American Dredging Co., 355 U.S. 426, 78 S.Ct. 394, 2 L.Ed.2d 382 (1958) (defendant is liable when injury to worker is caused -- in whole or in part -- by defendant); Ellen M. Flynn et al., 1B Benedict on Admiralty §21 (6th ed. 1993) (Jones Act requires only that defendant's negligent act or omission have played any part -- even the slightest -- in producing plaintiff's injury).

18 Landry v. Two R. Drilling Co., 511 F.2d 138, 142 (1975) (citing Johnson v. United States, 333 U.S. 46, 49, 68 S.Ct. 391, 393, 92 L.Ed. 468 (1948).

evidence of such a nexus, and that is all that is required to survive appellate review of a favorable verdict on a Jones Act negligence claim.[19]

C. The Collateral Source Rule

The district court ruled that the Plan, which was established and largely funded by Murphy Co., was a "collateral source" and, consequently, that Plan payments received by Davis could neither be set-off against the jury's award of damages nor brought to the attention of

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19 Clearly, a defendant's best hope of defeating a Jones Act negligence claim is at trial.

the jury.[20] Murphy Co. insists that both aspects of this ruling were erroneous.

The collateral source rule is a substantive rule of law that bars a tortfeasor from reducing the quantum of damages owed to a plaintiff by the amount of recovery the plaintiff receives from other sources of compensation that are independent of (or collateral to) the tortfeasor.[21] Married to this substantive

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20 The collateral source rule is "plainly applicable in Jones Act negligence cases". Phillips v. Western Co. of North America, 953 F.2d 923, 930 (5th Cir. 1992) (citing Tipton v. Socony Mobil Oil Co., 375 U.S. 34, 35, 84 S.Ct. 1, 2, 11 L.Ed.2d 4 (1963) (per curiam)); Bourque v. Diamond M Drilling Co., 623 F.2d 351, 354 n. 2 (5th Cir. 1980).

21 Phillips, 953 F.2d at 929. One underlying rationale for the collateral source rule is that plaintiffs should not be penalized because they had the foresight and prudence (or good fortune) to establish and maintain collateral sources of compensation. Phillips, (continued...)

21(...continued)
953 at 930. If tortfeasors could set off compensation available to plaintiffs through collateral sources, then plaintiffs who pay their own insurance premiums would suffer a net loss because they would derive no benefit from any premiums paid. Lomax v. Nationwide Mut. Ins. Co., 964 F.2d 1343, 1347 (3rd Cir. 1992). Additionally, such plaintiffs might be left exposed to other misfortunes once their insurance coverage was depleted by the tortfeasors' negligence. Phillips, 953 F.2d at 930. Moreover, even when third parties pay the compensation for plaintiffs' injuries, such payment should not have the effect of giving a windfall to tortfeasors. The liability of tortfeasors should not be excused or reduced simply because other sources of compensation are available. Quinones v. Pennsylvania Gen. Ins. Co., 804 F.2d 1167, 1171 (10th Cir. 1986). Permitting tortfeasors to set-off compensation available to plaintiffs from collateral sources would allow them to escape bearing the costs of their own conduct. Additionally, some courts emphasize that the collateral source rule prevents the deterrent effect of tort judgments from being undermined. Phillips, 953 F.2d at 930. Properly interpreted, however, the collateral source rule also prevents tortfeasors from paying twice for the same injury
(continued...)

rule is an evidentiary rule that proscribes introduction of evidence f collateral benefits out of a concern that such evidence might prejudice the jury.[22] Murphy Co. contends that the district court erred in not allowing it to deduct Plan payments received by Davis from Davis' damage award, and in not allowing it to introduce to the jury evidence of such payments. We proceed to discuss first the issue of offset or deduction.

Sources of compensation that have no connection to the tortfeasor are inevitably collateral. The characterization of sources of compensation to which the tortfeasor contributes, however, is more

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21(...continued)
-- a result that would achieve both overdeterrence and overcompensation. Thomas v. Shelton, 740 F.2d 478, 484-85 (7th Cir. 1984); accord Phillips, 953 F.2d at 931; Perry v. Larson, 794 F.2d 279, 286 (7th Cir. 1986).

22 Phillips, 953 F.2d at 930.

problematic: such sources may be -- but are not necessarily -- collateral.[23] Although a bright-line test allowing a tortfeasor to reduce its liability to an employee by the amount of compensation paid would have the virtue of simplicity, such a test could yield absurd results. For example, should the salary paid by an employer -- tortfeasor be allowed to offset damages awarded to an employee plaintiff because of the employer's negligence? Obviously not. Yet a myopic fixation on the source of compensation in analyzing the collateral source rule could produce such bizarre results.

Generally speaking, when an employee has bargained for a fringe benefit as additional consideration for employment, compensation received by the employee under that fringe benefit should not be

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23 Id. at 931.

deducted from damages awarded to the employee as a result of the employer's negligence.[24] As the employee is already contractually entitled to that benefit, allowing the employer to deduct such compensation would both undercompensate the employee and provide the employer with an undeserved windfall.[25] Thus, in evaluating whether a benefit derives from

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24 See, e.g., E.E.O.C. v. Grady, 857 F.2d 383, 391 (7th Cir. 1988) (pension benefits were collateral source, even though employer contributed to fund from which benefits were paid, because they were "part of claimants' compensation"); In re Air Crash Disaster Near Chicago, Illinois, On May 25, 1979, 803 F.2d 304, 308 (7th Cir. 1986) (life insurance policy was as much a part of employee's compensation as his salary, fringe benefits, and pension benefits); Haughton v. Blackships, Inc., 462 F.2d 788 (5th Cir. 1972) (trial court erred in deducting benefits received under seaman's maritime pension from damages awarded to seaman because of employer's negligence).

25 See ante note 19.

a collateral source, we ordinarily assess whether that benefit is in the nature of a fringe benefit (or deferred compensation) or instead reflects a tortfeasor's effort to anticipate potential legal liability.[26] Current application of the collateral source rule thus turns on the character of the benefits received, as well as the source of those benefits.[27]

In Phillips, we articulated several factors that assist in distinguishing fringe benefit plans from benefit plans intended to respond to legal liability: (1) whether the employee contributes to the plan, (2) whether the benefit plan stems from a collective bargaining agreement, (3) whether the plan covers both work-related and nonwork-related injuries, (4) whether payment under the plan

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26 Phillips, 953 F.2d at 932.

27 Haughton, 462 F.2d at 790.

correlate with the employee's length of service, and (5) whether the plan contains specific language requiring that benefits received under the plan be set-off against a judgment adverse to the tortfeasor.[28] These factors must not, however, be applied woodenly: In determining whether a benefit plan that is wholly or partly funded by the tortfeasor is a collateral source, the ultimate inquiry remains whether the tortfeasor established the plan as a prophylactic measure against liability.

In this case, determining whether the Plan is a collateral source presents a close question: neither party has cited us to precedents that neatly dispose of the issue, and we are aware of none. Applying the Phillips (actually the Allen) factors

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28 Phillips, 953 F.2d at 932 (citing Allen v. Exxon Shipping Co., 639 F.Supp. 1545, 1548 (D.Me. 1986)).

to the instant case, the district court concluded that the Plan constituted a collateral source. Although the court acknowledged several factors that militate against finding the Plan to be a collateral source,[29] it ultimately held that the Plan was a collateral source because (1) Davis contributed 10% to the funding of the Major Medical portion of the Plan, (2) the Plan applied exclusively to nonwork-related injuries, and (3) the Plan lacked explicit language requiring Plan benefits to offset any liability incurred by Murphy Co. We review de novo the

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29 Those factors are that (1) Murphy Co. had funded 90% of the Major Medical Plan and 100% of the Accident and Sickness Plan (which together comprised the Group Insurance Plan that paid Davis $174,259.68 in benefits), (2) the Plan did not arise from a collective bargaining agreement, and (3) the Plan did not base medical and disability payments upon length of service.

district court's conclusion that the Plan is a collateral source.[30]

Our plenary review convinces us that the district court was correct in holding the Plan to be a collateral source. Nevertheless, our affirmation of the district court should not be read to indicate that an employer may never

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30 If we were reviewing the district court's underlying factual findings -- such as that Murphy Co. had funded 90% of the Major Medical Plan -- such a review would be based on the clearly erroneous standard. Here, however, we are reviewing the district court' analysis and application of several criteria that together comprise a legal test for whether a benefit is a collateral source. Such a review is de novo, whether we regard the analysis as a purely legal question, see, e.g., Leeper v. United States, 756 F.2d 300, 303 (3rd Cir. 1985) ("the gravamen of [Plaintiff's] argument is that the district court misapplied the law") (emphasis added), or as a mixed question of fact and law. See, e.g., United States v. Altech, Inc., 929 F.2d 1089, 1092 (5th Cir. 1991) (mixed question of fact and law is reviewed de novo).

insulate itself from liability by purchasing medical, accident, and disability insurance for its employees. In this case, however, the Plan's exclusive application to nonwork-related injuries is strong evidence that Murphy Co. did not establish the Plan to reduce its own legal liability. As an employer, Murphy Co. would not ordinarily be liable for nonwork-related injuries. The Plan therefore applies only under circumstances in which Murphy Co. is unlikely to be found liable for the injuries or illnesses of its employees. Thus, the Plan does not appear to have been devised to reduce Murphy Co.'s legal liability for its employees' maladies. Rather, it is closely akin to a fringe benefit -- part-and-parcel of its employees' compensation package.

We do not here attempt to delineate the exact circumstances in which we would hold that a medical and disability insurance plan, largely funded by an employer, is not a collateral source. We certainly would not want to discourage employers form taking prudent and wholesome prophylactic measures against potential liability: such prescience benefits both employer and employee. In this case, though, we are satisfied that the district court correctly held the Plan to be a collateral source, and -- consequently -- that payments received by Davis under the Plan should not offset damages awarded to Davis because of Murphy Co.'s negligence under the Jones Act.[31]

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31 We share the district court's concern that requiring Murphy Co. to pay both Plan premiums and Davis' past and future medical expenses (as part of Davis' damage award) appears to be making Murphy Co. pay twice for the (continued...)

We are not satisfied, however, that the district court was correct in holding that Plan payments may not offset amounts awarded to Davis for maintenance and cure. But as the district court found -- in the alternative -- that Murphy Co. had failed timely to raise the defense of set-off, we

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31(...continued)
same injury in contravention of a fundamental policy underlying the collateral source rule. See, e.g., Thomas v. Shelton, 740 F.2d 478, 484-85 (7th Cir. 1984); accord Phillips, 953 F.2d at 931; Perry v. Larson, 794 F.2d 279, 286 (7th Cir. 1986). As noted above, however, when the benefit at issue was established and funded by the employer as additional compensation (i.e., as a fringe benefit), refusing to deduct benefit payments from the plaintiff-employee's damage award does not make the employer pay twice -- any more than refusing to set off employee's salary would make the employer pay twice. Additionally, in this case the insurance company -- qua subrogor -- may well have the right to recover insurance payments wrongly received by Davis under the erroneous assumption that Davis' injury was nonwork-related. Ultimately, then, Davis may not be paid twice for the same injury.

affirm the district court. Nevertheless, we briefly discuss the issue of maintenance and cure obiter dictum to provide guidance in an area of law that is but sparsely populated with relevant jurisprudence.

Maintenance and cure is a seaman's right under general maritime law to received food and lodging (maintenance) and necessary medical services (cure) if he falls ill while in the serve of a vessel.[32] The owner of a vessel has a duty to pay maintenance and cure that is unrelated to any duty of care under tort law.[33] "Because of the unique nature of

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32 Calmar S.S. Corp. v. Taylor, 303 U.S. 525, 527, 58 S.Ct. 651, 652, 82 L.Ed. 993 (1938); see also generally Thomas J. Schoenbaum, Admiralty and Maritime Law §5-2 (1987 & Sup. 1989) (discussing seaman's right to maintenance and cure).

33 Adams v. Texaco, Inc., 640 F.2d 618, 620 (5th Cir. 1981).

maintenance and cure, normal rules of damages, such as the collateral source rule in tort, are not strictly applied."[34]

Generally speaking, a seaman "may recover maintenance and cure only for those expenses actually incurred".[35] Despite this general rule, however, a shipowner is not entitled to set-off against an aware for maintenance and cure

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34 Gauthier v. Crosby Marine SErv. Inc., 752 F.2d 1085, 1089 (5th Cir. 1985).

35 Id. (citing Field v. Waterman S.S. Corp., 104 F.2d 849, 851 (5th Cir. 1939)). For example, in Brown v. Aggie & Miller, Inc., we concluded that a seaman was not entitled to maintenance and cure because he had received care and treatment in a public hospital and thus had incurred no expense. 484 F.2d 1293, 1296 (5th Cir. 1973). Similarly, in Johnson v. United States, the Supreme Court held that an injured seaman who received care and treatment from his parents was not entitled to maintenance and cure because he had not incurred any actual expense. 369 U.S. 527, 533, 82 S.Ct. 997, 1001, 8 L.Ed.2d 88 (1962).

all monies that a seaman receives.[36] In Vaughan v. Atkinson, for example, the Supreme Court held that a shipowner was not entitled to deduct monies earned by an injured seaman -- who worked as a taxicab driver while his claim was pending -- from the seaman's maintenance and cure award.[37] The Court reasoned that if a shipowner were permitted to disregard its obligation to provide maintenance and cure and then deduct money earned by the seaman during the pendency of his claim, the underlying purpose of a shipowner's duty to provide maintenance and cure -- namely the protection of injured seaman -- would be undetermined.[38] Following the Supreme Court's reasoning, we held in Gauthier

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36 Gauthier, 752 F.2d at 1090.

37 369 U.S. 527, 533, 82 S.Ct. 997, 1001, 8 L.Ed.2d 88 (1962).

38 Id.

that when a seaman has alone purchased medical insurance, a shipowner is not entitled to deduct from its maintenance and cure obligation monies received by the seaman from his insurer.[39] Thus, while an injured seaman is not generally entitled to maintenance and cure when he does not incur any expense, the law establishes an exception -- one which forbids the shipowner form escaping his obligation to provide maintenance and cure by referring to monies received by the seaman through his own efforts. In this case, however, the exception is inapplicable.

The record indicates that Davis contributed very little to the Plan established by Murphy Co. to pay for nonwork-related injuries: he paid 10% of the premium for the Major Medical portion of the Plan and none of the premium for

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39 Gauthier, 752 F.2d at 1090.

the Accident and Sickness portion of the Plan. As the district court noted, it is undisputed that through these plans Davis "received payments sufficient to satisfy any food, lodging, or medical expenses." Thus, given that -- as noted above -- normal rules of damages, such as the collateral source rule in tort, are not strictly applied to awards for maintenance and cure,[40] the district court may possibly have erred in concluding that Murphy Co. could not deduct these Plan disability payments from Davis' maintenance award. As the district court found in the alternative that Murphy Co. had waived its "set-off defense" by failing to plead it prior to the deadline for filing amended pleadings, however, we affirm the district court's denial of a

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40 *Gauthier*, 752 F.2d at 1089.

set-off with respect to Davis' maintenance award as well.[41]

B. *Other Assignments of Error*

Most of Murphy Co.'s remaining criticism involves alleged errors by the district court in refusing to permit Murphy Co. to introduce certain evidence or in allowing Davis to introduce certain other evidence. We review a district court's evidentiary rulings only for abuse of discretion[42] and here find no such abuse. One evidentiary issue was of

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41 In his brief to this panel, Davis reiterated his contention that Murphy Co. "did not plead off-set, mistake, estoppel, payment or any other defense of an equitable nature" and thus waived these defenses. Murphy Co. never responded to this contention.

42 *United States v. Central Gulf Lines, Inc.*, 974 F.2d 621, 625 (5th Cir. 1992); *Wright v. Hartford Accident & Indem. Co.*, 580 F.2d 809, 810 (5th Cir. 1978).

special concern to us, however, so we discuss it in some detail.

Murphy Co. complains that its defense was prejudiced by the district court's refusal to allow admission of several health insurance claims forms (the Forms), which indicated that Davis' illness was *not* work-related. Murphy Co. contends that the admission of the Forms would have allowed it more effectively to dispute the central issue of medical causality, as well as to better impeach Davis' expert medical witness, Dr. Kirkwood.

The district court based its decision to exclude the Forms on several factors. First, it noted that Davis had himself filled out many of the Forms, and that he was not qualified under Federal Rule of Evidence 703 to offer expert testimony in the etiology of his condition. Second, as discussed above, the district court held

that the Plan constituted a collateral source. As such, the court concluded, evidence of insurance payments simply had no relevance to the lawsuit.[43] Third, the district court found the probative value of the Forms to have been substantially outweighed by the danger of unfair prejudice and therefore excluded the Forms under Fed.R.Evid. 403.

Technically, the district court was probably incorrect in determining that the Forms literally had no relevance because they were evidence of a collateral source. As the plan was a collateral source, the Forms were clearly not relevant (and could not be admitted) with respect to the issue of mitigation (or set-off) of damages. Yet, the forms may very well have been

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43 The district court cited *Phillips v. Western Co. of North America*, 953 F.2d 92, 930 (5th Cir. 1992), for the proposition that evidence of collateral sources has no relevance.

relevant with respect to the issue of medical causality.[44] But the district court also offered two additional grounds for excluding the Forms.

We find the district court's ruling based on Fed.R.Evid. 403 to be particularly defensible. The court indicated that -- in its judgment -- the Forms had very low probative value because they were filled out by Davis and by anonymous medical clerks relying on Davis' representations. The court also noted that the signatures of the attending physicians were rubber-stamped onto the

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44 The district court doubtless could have admitted the Forms with a limiting instruction to the jury to the effect that the Forms could be considered with respect to the issue of medical causality and for impeachment, but not with respect to the issue of damages, i.e., set-off. Nonetheless, the district court's decision to exclude the Forms under Fed.R.Evid. 403 and 702 does not amount to an abuse of discretion.

Forms.[45] Moreover, the attending physicians submitted affidavits in which they declared that the Forms did not reflect their true medical opinions, thus further reducing the probative value of the Forms. On the other hand, the district court found that the Forms were highly prejudicial because "no juror ... will misunderstand the import of submitting a claim form to an insurance administrator." In view of these observations, we cannot say that district court abused its discretion in refusing to admit the Forms.

III

CONCLUSION

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45 Murphy Co. did ultimately present to the district court a few forms bearing Dr. Kirkwood's actual signature, but the court ruled this evidence to have been untimely presented.

None of Davis' 19 claims of error justifies reversing the district court in this case. After carefully reviewing the record, we cannot say that Davis' Jones Act negligence claim is characterized by a complete absence of supportive, probative facts, and we are therefore constrained to affirm the jury's verdict that Murphy Co. was negligent. Whether or not we are convinced that a scientifically verifiable causal nexus exists between exposure to hydrocarbons and development of GPS is irrelevant: we are not here to second-guess the jury as factfinder, and it found causation on the basis of "some" probative evidence. We also affirm the district court's conclusion that the Group Insurance Plan was a collateral source, even though it was funded almost entirely by Murphy Co. Although we emphatically do not wish to discourage employers from

taking prophylactic measures against future liability, in this case, the fact that the Plan applied exclusively to nonwork-related injuries leads us inexorably to the conclusion that the Plan was conceived not as a hedge against liability but as a fringe benefit to further compensate employees. The verdict of the jury and the judgment of the district court are therefore AFFIRMED.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 92-9529

BEVERLY P. DAVIS WIFE OF, AND
WILLIE EARL DAVIS
Plaintiff-Appellee

VERSUS

MURPHY EXPLORATION & PRODUCTION COMPANY,
Originally sued as ODECO, INC.
Defendants-Appellants

Appeal from the United States District Court for the Eastern District of Louisiana

ON SUGGESTION FOR REHEARING EN BANC

(Opinion 04/04/94, 5 Cir.___, __ F.3d __)
(May 3, 1994)

Before VAN GRAAFEILAND,* SMITH, and WIENER, Circuit Judges.

PER CURIAM:

Treating the suggestion for rehearing en banc as a petition for panel rehearing, it is ordered that the petition for panel

rehearing is DENIED. No member of the panel nor Judge in regular active service of this Court having requested that the Court be polled on rehearing en banc (Federal Rules of Appellate Procedure and Local Rule 35), the suggestion for Rehearing En Banc is DENIED.

*Circuit Judge of the Second Circuit, sitting by designation.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Appendix to the Petition For Writ Of Certiorari of petitioner, Murphy Exploration & Production Company, has been forwarded to all counsel of record, by mailing same, postage prepaid and properly addressed, this 9th day of June, 1994.

Supreme Court, U.S.
FILED
JUL 8 1994
OFFICE OF THE CLERK

No. 93-1986

In The

Supreme Court of the United States

October Term, 1994

MURPHY EXPLORATION AND PRODUCTION COMPANY,

Petitioner,

versus

WILLIE EARL DAVIS,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. Did the Fifth Circuit correctly apply the Jones Act appellate standard of review to this jury's finding regarding the cause of Respondent's rare disease where the verdict was supported by reliable and valid scientific evidence admitted without objection?

2. Did the lower courts properly deny Petitioner's claim for set-off where Petitioner failed to timely plead set-off and where Petitioner's fringe benefits plans did not provide for a set-off of fringe benefits against a Jones Act award?

3. Did the trial judge commit a clear abuse of discretion in finding that the prejudicial effect of evidence of Petitioner's payment of fringe benefits to Respondent outweighed its probative value given the unique circumstances presented by this case?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

STATEMENT OF THE CASE 1

REASONS FOR DENYING THE WRIT 3

1. The Fifth Circuit Applied the Correct Appellate Standard of Review; Whether the Standard was Correctly Applied to the Unique Facts of this Case is not Worthy of Review by This Court... 3

2. Petitioner's Untimely Presented Claim for Set-Off in the Absence of a Plan Provision Allowing for Set-Off is Based on an Erroneous Factual Premise and is not a Matter of Legal or Practical Importance Beyond the Concerns of the Present Parties 6

3. The Question of Whether the Trial Court Clearly Abused its Discretion in Finding that the Highly Prejudicial Claim Form Evidence Outweighed its Weak Probative Value is not Worthy of This Court's Review 10

CONCLUSION 13

TABLE OF AUTHORITIES

Page

CASES:

Atlantic and Gulf Stevedores, Inc. v. Ellerman Lines, 369 U.S. 355 (1962) 3

Calmar S.S. Corp. v. Taylor, 303 U.S. 525 (1938) 11

Comeaux v. T.L. James & Co., 702 F.2d 1023 (5th Cir. 1983) 4

Daubert v. Merrill-Dow Pharmaceuticals, Inc., ___ U.S. ___, 113 S.Ct. 2786 (1993) 5, 6

Dennis v. Denver and R.G.W.R. Co., 375 U.S. 208 (1963) 4

Eichel v. New York Central Railroad Co., 375 U.S. 253 (1963) 10

Ferguson v. Moore-McCormack Lines, 352 U.S. 521 (1957) 4

Fleming v. American Export Isbrandtsen Lines, 451 F.2d. 1329 (2nd Cir. 1971) 4

Johnson v. Bryant, 671 F.2d 1276 (11th Cir. 1982) 4

Joyce v. Atlantic Richfield Co., 651 F.2d 676 (10th Cir. 1981) 4

Lavender v. Kurn, 327 U.S. 645 (1946) 4

Mayhew v. Bell, 917 F.2d 838 (6th Cir. 1990) 1

Metropolitan Life Insurance Co. v. Massachusetts, 471 U.S. 724 (1985) 7

Phillips v. Western Company of North America, 953 F.2d 923 (5th Cir. 1992) 7

Provident Life & Accident Insurance Co. v. Waller, 906 F.2d 985 (4th Cir. 1990) 8

TABLE OF AUTHORITIES – Continued

Page

Rogers v. Missouri Pacific Railroad Company, 352 U.S. 500 (1957) 4

Southwest Marine, Inc. v. Gizoni, ___ U.S. ___, 112 S.Ct. 486 (1991) 10

Tipton v. Socony Mobil Oil Co., Inc., 375 U.S. 34 (1963) 10

United States v. Johnson, 268 U.S. 220 (1925) 4

Wilkerson v. McCarthy, 336 U.S. 53 (1949) 4

STATUTES:

Employees' Retirement Income Security Act of 1974, 29 U.S.C. §1001 et seq 7

Federal Employers' Liability Act, 45 U.S.C. §51 et seq ..... *passim*

Federal Rule of Evidence 403 10

Federal Rules of Evidence 701-702 4

Jones Act, 46 U.S.C. §688 ..... *passim*

TREATISES:

Canan and Mitchell, *Employee Fringe and Welfare Benefits Plans* (1994) 8

SCIENTIFIC ARTICLES:

Bombassei GJ, Kaplan AA (1992): *The Association Between Hydrocarbon Exposure and Anti-Glomerular Basement Membrane Antibody-Mediated Disease (Goodpasture's Syndrome)* Am J Ind Med 21:141-153 2

TABLE OF AUTHORITIES – Continued

Page

Daniell WE, Couser WG, Rosenstock L (1988): *Occupational Solvent Exposure and Glomerulonephritis. A Case Report and Review of the Literature.* JAMA 259(15):2280-2283 2

STATEMENT OF THE CASE

The Petition fails to accurately portray the record in this case. Respondent will therefore briefly summarize the pertinent record facts concerning the reviewability of the three questions presented.

The record contains evidence of Respondent's extensive and repeated exposure to the mist of volatile hydrocarbon solvents while spray painting aboard Petitioner's drilling vessels. (e.g., Tr. 83, 130 and 193). After considering this exposure history, Respondent's treating nephrologist, Dr. R. Garth Kirkwood, testified "that it is more probable than not that Mr. Davis' hydrocarbon exposure played a contributory causal role in his development of Goodpasture's Syndrome."[1] (Tr. 499-500). No questions concerning the admissibility of this testimony have been presented to this Court.[2]

The body of literature favoring a causal relationship relied upon by Respondent's experts includes case reports, animal studies and numerous epidemiological studies revealing a statistically significant incidence of substantial antecedent hydrocarbon exposure among

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[1] Goodpasture's Syndrome refers to anti-glomerular basement membrane glomerulonephritis when accompanied by symptoms of pulmonary hemorrhage.

[2] Petitioner only objected that Dr. Kirkwood's testimony was not expressed to a reasonable degree of medical certainty. (Tr. 499-500). The trial court responded that the proper standard of proof was medical probability rather than reasonable medical certainty and overruled the objection. *See Mayhew v. Bell*, 917 F.2d 838 (6th Cir. 1990). The trial court's ruling to admit the evidence was not appealed to the Fifth Circuit.

glomerulonephritis patients. The opinion Dr. Kirkwood rendered at trial merely echoed the published consensus of scientists considering this same body of evidence.[3]

With respect to Petitioner's claim of set-off, Petitioner's insistence that it only paid fringe benefits due to representations on claim forms indicating that the disease was not work-related is completely contrary to the record facts. The record shows that Petitioner made the decision to classify the illness as nonoccupational prior to the receipt of any claim forms from Respondent or his physicians. (R. 1785 and 1786). Furthermore, Petitioner continued to pay fringe benefits after Respondent's Jones Act claim was filed and even after the physicians executed affidavits indicating that the claim forms did not accurately express their opinion about whether Respondent's disease was related to his work. (R. 1240 and 1278 at Ex. 8, pp. 25-28 and Ex. 9, pp. 3-6).

The trial court's decision not to deduct the fringe benefits received by Respondent from the Jones Act award did not solely rest on the application of the collateral source rule. The rulings of the lower courts were also based on the failure of Petitioner to raise an affirmative defense of set-off and the failure of Petitioner to timely present its counterclaim for return of the benefits. (R. 1707-1726).

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[3] *See, e.g.* Bombassei GJ , Kaplan AA, (1992): *The Association Between Hydrocarbon Exposure and Anti-Glomerular Basement Membrane Antibody-Mediated Disease (Goodpasture's Syndrome)* Am J Ind Med 21:141-153; Daniell WE, Couser WG, Rosenstock L (1988): *Occupational Solvent Exposure and Glomerulonephritis. A Case Report and Review of the Literature.* JAMA 259(15):2280-2283.

Finally, a key aspect of the record omitted by Petitioner's statement of the case concerns the peculiar structure of Petitioner's fringe benefits plans. The plans contain work-related exclusions, however, absent from the plans are corresponding provisions to require set-off or reimbursement in the event of a Jones Act award. (R. 1278). Petitioner's plans do not link the determination to pay benefits under the plans with a subsequent determination of a causation issue in a Jones Act trial.

REASONS FOR DENYING THE WRIT

1. THE FIFTH CIRCUIT APPLIED THE CORRECT APPELLATE STANDARD OF REVIEW; WHETHER THE STANDARD WAS CORRECTLY APPLIED TO THE UNIQUE FACTS OF THIS CASE IS NOT WORTHY OF REVIEW BY THIS COURT.

Petitioner confuses the issue of whether "the Fifth Circuit applied the wrong standard" with the distinct question of whether that standard was properly applied to the unique and rare facts presented by this record. (Petition, p.6).

To the extent that Petitioner contends that the complete absence of probative evidence standard employed by the Fifth Circuit is not proper[4], Petitioner presents no authority or even argument supporting its position. No

[4] This Court has approved of the standard because "trial by jury is part of the remedy" provided by the Federal Employers' Liability Act (FELA) and the Jones Act. *Atlantic and Gulf Stevedores, Inc. v. Ellerman Lines*, 369 U.S. 355, 360 (1962).

courts are in conflict on the issue. The complete absence of probative fact standard for cases brought under FELA and the Jones Act has been repeatedly announced by this Court and has been uniformly applied in the circuits. *E.g., Ferguson v. Moore-McCormack Lines*, 352 U.S. 521, 523 (1957); *Dennis v. Denver and R.G.W.R. Co.*, 375 U.S. 208, 210 (1963); *Wilkerson v. McCarthy*, 336 U.S. 53, 57 (1949); *Lavender v. Kurn*, 327 U.S. 645 (1946); *see also Comeaux v. T. L. James & Co.*, 702 F.2d 1023, 1025 (5th Cir. 1983) (on rehearing); *Johnson v. Bryant*, 671 F.2d 1276, 1279 (11th Cir. 1982); *Joyce v. Atlantic Richfield Co.*, 651 F.2d 676, 682 (10th Cir. 1981); *Fleming v. American Export Isbrandtsen Lines*, 451 F.2d 1329, 1331 (2nd Cir. 1971).

Similarly, Petitioner's suggestion that the "feather-weight" standard of proof applies to issues of negligence but not of causation is a misstatement of existing jurisprudence. There is no controversy to the proposition that recovery is warranted where the shipowner's neglect has played any role – even the slightest – in producing a seaman's injury. *Rogers v. Missouri Pacific Railroad Company*, 352 U.S. 500, 506 (1957).

Stripped of the erroneous suggestion that the Fifth Circuit erred in discerning the appropriate legal standard of review, then, Petitioner simply contends that given the facts of this unique case, there was indeed a complete absence of probative evidence. Petitioner's contention that the jury and the courts below wrongly grasped the record facts is merely a purported failure of fact-finding unworthy of review by this Court. *See, e.g., United States v. Johnson*, 268 U.S. 220, 227 (1925).

By lifting a few words and phrases from the Fifth Circuit's opinion out of their proper context, the Petition inaccurately brands the opinion as sanctioning recovery based on speculation. The record shows, however, that scientists publishing their conclusions have written that the relationship is more likely to be causal than coincidental. (E.g., Tr. 500-504). After citing this evidence, the Fifth Circuit declared the evidence of causation to be "probative" and "sufficient to support the jury verdict." (A-18; A-43). Although the Fifth Circuit's discussion of the association between hydrocarbons and Goodpasture's Syndrome carries a more skeptical tone than most of the peer reviewed scientific writings, the Fifth Circuit did not say that the evidence on which the verdict was based was unreliable, irrelevant, invalid, inadmissable, merely speculative or unreasonable. This Court should not use the record of this case containing valid and reliable evidence of causation to issue an advisory opinion that records of lesser sorts will not support verdicts in favor of Jones Act claimants.

In *Daubert v. Merrill-Dow Pharmaceuticals, Inc.*, ___ U.S. ___, 113 S.Ct. 2786 (1993), the underlying scientific controversy was the association of Bendectin and limb reduction birth defects. Although the federal courts have been inundated by Bendectin cases, this Court's review of the matter only addressed the means of appropriately resolving such controversies in accordance with federal procedural and evidentiary[5] rules. This Court properly

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[5] FRE Rules 701-707 provide potent protection for defendants facing spurious scientific claims. Petitioner never raised any objections to the validity or reliability of Dr. Kirkwood's

restrained from deciding the underlying scientific dispute. Given the nature of this Court's review in *Daubert*, this Court should now decline Petitioner's invitation to jump into the midst of an exceedingly obscure scientific controversy about Goodpasture's Syndrome and hydrocarbon exposure and choose sides. It is not the proper task of this Court to present a catalogue of which propositions in science are valid and which are not.

In summary, Petitioners do not raise any controversial or important issues of federal substantive or procedural law. Petitioners simply want a change in the result of this particular case. The essence of the dispute between the parties is whether Respondent's hydrocarbon exposure did in fact play some role in his development of Goodpasture's Syndrome. It is not the proper function of this Court to change the jury's determination of that factual issue.

2. PETITIONER'S UNTIMELY PRESENTED CLAIM FOR SET-OFF IN THE ABSENCE OF A PLAN PROVISION ALLOWING FOR SET-OFF IS BASED ON AN ERRONEOUS FACTUAL PREMISE AND IS NOT A MATTER OF LEGAL OR PRACTICAL IMPORTANCE BEYOND THE CONCERNS OF THE PRESENT PARTIES.

The Petition raises no disagreement with the Fifth Circuit's discussion of the general application of the collateral source rule. Petitioner does not dispute that the rule can properly be applied to the Jones Act or FELA

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testimony, and thus, Petitioner's suggestion that the Fifth Circuit's decision conflicts with *Daubert* is baseless.

context where the employer-defendant and the payor of benefits is the same entity. Moreover, Petitioner does not quarrel with nor seek review of the lower courts' determination that Petitioner's plans were fringe benefit plans and therefore a collateral source rather than plans formulated in anticipation of potential legal liability. Petitioner's complaint is merely that the application of the collateral source rule to the unique facts of this case led to an unfair result.[6] This may be a matter of interest to Petitioner and Respondent but is of little other importance.

The courts below did not suggest that payments from health or disability plans are always subject to the collateral source rule. Courts are to determine whether plan payments are to be classified as collateral fringe benefits by examining the many factors outlined in *Phillips v. Western Company of North America*, 953 F.2d 923, 932 (5th Cir. 1992). Since the courts have listed the kinds of plan provisions which will lead to the application of the collateral source rule, it is a simple matter for an employer to draft a plan to avoid the rule's consequences.[7] The

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[6] Respondent will not belabor the fairness issue except to state that there is nothing unfair about an employer paying twice where the employer assumes legal obligations in addition to its Jones Act duties under benefits plans which are provided in lieu of additional compensation.

[7] The plans at issue are governed by the Employees' Retirement Income Security Act of 1974 (ERISA). ERISA grants broad discretion to entities writing welfare plans to determine what they will and will not cover. ERISA "does not regulate the substantive content of welfare-benefits plans." *Metropolitan Life Insurance Co. v. Massachusetts*, 471 U.S. 724, 732 (1985).

insertion of a set-off provision, for example, would not only tend to prevent a finding that a plan provides fringe benefits, but would also defeat a "double recovery" when enforced. *See, e.g., Provident Life & Accident Insurance Co. v. Waller*, 906 F.2d 985 (4th Cir. 1990) (enforcing a plan provision requiring reimbursement of benefits from tort recovery.). Given the peculiar nature of Petitioner's plans which omit standard reimbursement provisions, there is no importance to this issue.[8]

Even if the question of the application of the collateral source rule to plans with work-related exclusions but missing set-off provisions was in need of Supreme Court amplification, the nature of the record and decisions below precludes review in this case. Petitioner urges that this Court create an exception to the application of the collateral source rule because Petitioner was unfairly induced to pay fringe benefits due to statements on claim forms indicating that the illness was not work-related. The record facts, however, show that the claim forms were wholly irrelevant to Petitioner's decision to pay benefits. The record establishes that Petitioner made the strategic decision to classify the condition as nonoccupational prior to receiving any input about the cause of the disease from Respondent or his physicians (R. 1785-1786). This classification was never changed despite the production of affidavits from Respondent's physicians stating that the claim forms did not constitute the physicians'

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[8] Plan provisions allowing reimbursement from tort recovery are featured in model welfare-benefits plans. *See, e.g.*, Canan and Mitchell, *Employee Fringe and Welfare Benefits Plans*, 531 (1994).

opinions on causation. (R. 1240 and 1278 at Ex. 8, pp. 25-28 and Ex. 9, pp. 3-6). Thus, this Court cannot reach the question presented without first overturning the trial court's determination that Petitioner never relied on any representations by Respondent or his physicians. (R. 1707-1726).

Furthermore, this Court cannot reach the question presented because the lower courts announced an independent basis for denying set-off. The trial court held that Petitioner was not entitled to a set-off because it was not pleaded as an affirmative defense. (R. 1707-1726). The trial court's decision not to allow the jury award to be reduced by the receipt of fringe benefits is also supported by the trial court's denial of Petitioner's motion for leave to file counterclaim seeking recovery of the payments on grounds of untimely presentation.[9] (R. 1707-1726). These rulings were undisturbed by the Court of Appeal and the Question Presented does not raise these timeliness issues. (A-37-38). Since this Court's consideration of the Question Presented cannot affect the outcome of the case, this Court should not review the moot issue raised by the Petition.

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[9] Review in this matter is also not warranted in light of Petitioner's other continuing efforts to avoid a "double recovery." On the eve of trial, Petitioner filed a suit for reimbursement based on fraud, misrepresentation and detrimental reliance against Respondent and two of his expert witnesses. (R. 1959). The suit against Respondent was removed to federal court and is presently on appeal to the Fifth Circuit. *Murphy Exploration & Production Company v. Davis*, No. 92-3294. The action is still pending in state court against the physicians.

3. THE QUESTION OF WHETHER THE TRIAL COURT CLEARLY ABUSED ITS DISCRETION IN FINDING THAT THE HIGHLY PREJUDICIAL CLAIM FORM EVIDENCE OUTWEIGHED ITS WEAK PROBATIVE VALUE IS NOT WORTHY OF THIS COURT'S REVIEW.

The third Question Presented asks this Court to dive into the specific facts of this case and to determine whether the prejudicial impact of the claim form evidence was so strongly outweighed by its probative value that the trial court's decision to exclude the evidence was a clear abuse of its discretion.

By its nature, FRE 403 involves a fact-intensive inquiry unique to every case. Despite FRE 403's grant of discretion to trial judges to balance factors favoring and opposing admissibility in the context of specific cases, Petitioner urges this Court to announce an inflexible rule of admissibility whenever a seaman accepts benefits from plans with a work-related exclusion. Employers would be able to exchange the payment of fringe benefits earned by an employee for potentially damaging evidence in the event the employee later seeks to assert rights under the Jones Act. A mandatory admissability rule would as a practical matter force workers to select remedies. Such a result has long been denounced by this Court. *See, e.g., Southwest Marine, Inc. v. Gizoni*, ___ U.S. ___, 112 S.Ct. 486 (1991); *Tipton v. Socony Mobil Oil Co., Inc.*, 375 U.S. 34 (1963); *Eichel v. New York Central Railroad Co.*, 375 U.S. 253 (1963) (holding that the receipt of longshore benefits is not admissible against or a bar to a subsequent Jones Act claim that a worker is a seaman rather than a longshoreman).

Moreover, the trial judge's decision to exclude the claim form evidence in this case was proper. The Petition argues at length that introduction of the claim forms was necessary to allow Petitioner to explain why it did not pay maintenance and cure and thus defend against the punitive damages claim. (Petition, pp. 19-20). Questions of maintenance and cure, however, have nothing to do with whether a disease was caused by the seaman's employment. *Calmar S.S. Corp. v. Taylor*, 303 U.S. 525, 527 (1938). Moreover, since no punitive damages were awarded to Respondent, Petitioners are urging that the Court address the issue purely in the hypothetical.

The claim forms were of little, if any, probative value for the purposes of impeaching Dr. Kirkwood. Although the Petition suggests that Dr. Kirkwood made an informed decision that the disease was not work-related and later arbitrarily changed his mind, the record shows otherwise. The claim forms[10] only bear stamps of Dr. Kirkwood's signature on the bottom halves of the two part claim forms. The information on the top sections of the forms is information provided by "subscriber or insured" which was transcribed by Dr. Kirkwood's staff from the original form prepared by the patient. (R. 1278 (Smith 7, 8 and 9)). It is obvious from the face of the

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[10] Only one form actually bears Dr. Kirkwood's handwritten signature. This form was uncovered from Petitioner's files late in the proceedings. (R. 1278 (Smith 3A)). The district court excluded this form as untimely presented, a ruling which was undisturbed by the Court of Appeal. (R. 1724-26; A-42). Furthermore, it was never established that Dr. Kirkwood had any knowledge of the patient's hydrocarbon exposure at the time this form was signed. (R. 1808).

forms that the top sections of the forms – only sections which contain the checkmarks indicating that the disease is not work-related – do not constitute statements which can properly be attributed to the physicians.

Finally, Petitioner never presented any request to give the jury a limiting instruction during the trial. Petitioner first advanced the merits of limiting the evidence to impeachment in its Suggestion for Rehearing *En Banc*. Before the trial court, however, Petitioner vigorously argued that the jury needed to know that Respondent recovered money from the plan, that is, that Respondent was seeking what Petitioner considers a "double recovery". (E.g., R. 1708). Under these circumstances it is not appropriate for this Court to consider whether the trial judge abused his discretion in excluding rather than limiting the claim form evidence.

CONCLUSION

Considering the foregoing, it is respectfully submitted that the Writ of Certiorari be denied.

Respectfully submitted,

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